

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

In the Matter of the Petition of)
)
UNITED STATES DEPARTMENT OF)
AGRICULTURE, FOREST SERVICE)
)
For Review of Resolution No. 86-201 of)
the California Regional Water Quality)
Control Board, Central Valley Region.)
Our File No. A-457.)
_____)

ORDER NO. WQ 87- 5

BY THE BOARD:

On October 24, 1986, California Regional Water Quality Control Board, Central Valley Region (Regional Board) adopted waste discharge requirements (NPDES No. CA0081906) regulating discharges from a mining project located within the Plumas National Forest. Both the mine operator, Calgom Mining, Inc., and the United States Forest Service were named as dischargers. The Forest Service filed a timely petition challenging its designation as a discharger on November 19, 1986.

I. BACKGROUND

Calgom Mining, Inc. operates a gold mine near Canyon Dam in the vicinity of Lake Almanor. It uses a heap-leach process which consists of ore crushing, agglomeration with lime, piling the ore on a clay and artificially-lined surface, and spraying a dilute cyanide solution over the pile. The leachate from the pile is collected in a sump and recycled over the ore pile. After all mineral values are leached from the ore pile, the solution is passed through a series of carbon adsorption columns where the mineral values are removed. The solution is drained from the columns and is returned to the leach pads.

The Forest Service prepared an environmental review of the project and issued a finding that no significant impact would result from the project. The finding was based on the assumption that the mining company would adhere to the proposed method of operation and would comply with the requirements of all regulatory agencies. No discharge was allowed.

As a result of intense storms in February of 1986, the holding capacity of the leachate ponds was exceeded and process water containing cyanide and possibly metals had to be treated and discharged. After that episode, the mining company modified its operation to reduce the amount of process water and rainfall runoff that would have to be contained and applied for this NPDES permit to treat and discharge process water, if necessary, during periods of extremely high rainfall and runoff. The permit sets limits for such a discharge. While only Calgom Mining, Inc. was named as a discharger under the earlier permit, the revised permit names both Calgom and the Forest Service.

II. CONTENTION AND FINDING

Contention: The Forest Service (petitioner) raises only one issue: is it proper to name, in the waste discharge requirements issued to its permittee, a governmental entity which owns and manages the land on which a discharge occurs? The petitioner argues that it is not only legally inappropriate to name it as a discharger under such circumstances, but it is bad policy which makes quick and certain enforcement less likely to occur.

Finding: This Board has consistently taken the position that a landowner who has some ability to control what takes place on his or her land

Can be held accountable for discharges which occur on the property. In Order No. WQ 86-18 (Vallico Park, Ltd.), Order No. WQ 86-15 (Stuart Petroleum), Order No. WQ 86-11 (Southern California Edison Company), Order No. WQ 86-2 (Zoecon Corporation), and other earlier orders, we upheld the decision of the Regional Board to name in waste discharge requirements or cleanup and abatement orders the owner of the land on which the discharge occurred. In each case, the landowner did not take an active role in the discharge but, in each case, the landowner was in a position to prevent the discharge and knew or should have known that the discharge was taking place.¹

Here there is no question that the petitioner knew what was going on in the mining operation. The permit specifically issued by the petitioner to the mining company discussed the operation in great detail as did the accompanying environmental document. The petitioner was also, by its own admission, in a good position to control how the mining operation was conducted. In the petition, it is stated:

"...our own laws, regulations, policies and procedures provide the Forest Service with the regulatory responsibility and authority to ensure that second parties using National Forest lands under permit, contract, easement, right of way or other instrument of occupancy are in compliance with federal, state and local laws. This includes regulatory authority to ensure their compliance with federal or state water quality permits and/or waste discharge requirements."

Thus, the three elements at which we look to determine that a landowner can be held accountable are satisfied in this instance: ownership,

¹ Actual knowledge of a discharge may be required when a reasonable person would not have suspected that a problem could arise from the land use involved. However, a landowner can be held accountable, even without actual knowledge, where the activity permitted on the property might be expected, by a reasonable and prudent landowner, to result in a discharge.

knowledge of the activity, and the ability to regulate it. Under California law, the Regional Board acted properly.

The petitioner has also argued that since federal regulations require the operator to obtain a permit (40 Code of Federal Regulations Section 122.21(b)), the landowner is not to be included in the permit. The conclusion does not follow from the premise. Clearly a landowner who plans no discharge need not apply for a permit. But if the landowner, or someone with permission to use his or her land, wants to discharge, a permit must be obtained. The regulations deal only with who must apply, not who may be named.²

As we have noted in many previous orders, even though the law permits the naming of a landowner in waste discharge requirements, it is not mandatory. In previous cases, we have reviewed the Regional Board's ability to determine the relative advantages and disadvantages of including a landowner in the order. What we must determine is whether the Regional Board's exercise of discretion is appropriate in this case. This is a close question.

There are both good and bad consequences which may result from including the Forest Service in an order. The Regional Board urges the fact that compliance is more likely since the Forest Service, by having more at stake, will hold its lessee more accountable. Enforcement capability may also be increased. On the other hand, naming the Forest Service may regrettably create an adversarial situation and hinder cooperation. On balance and given

² When the Legislature adopted Water Code Section 13270, which exempts from waste discharge requirements most leases by one public agency to another, federal agencies were not included. Leases of the type at issue here (between a federal agency and a private party) could have been exempted but were not. Inclusio unius est exclusio alterius.

our prior orders regarding who should be considered responsible parties, we find that the Regional Board acted appropriately.

Because the petitioner is a responsible public agency which is well equipped to require compliance of the mining company, it would be unwise to seek enforcement of the waste discharge requirements against the Forest Service until it becomes clear that Calgom will not comply. The Forest Service deserves the opportunity to exercise its own authority before the Regional Board holds it responsible for any violations of the requirements. While we conclude that the Forest Service was properly named, we also conclude that the Regional Board should only look to the Forest Service regarding enforcement should Calgom fail to comply with the waste discharge requirements.

III. CONCLUSION

It is proper for the Regional Board to name the United States Department of Agriculture, Forest Service as a discharger in an NPDES permit issued to Calgom Mining, Inc. which operates a gold mine on Forest Service land. It is permissible to name a landowner in waste discharge requirements when the landowner knows of the discharge and is in a position to prevent or regulate it. Those standards apply to the Forest Service in this case and the Regional Board has exercised its discretion in a reasonable way. However, the Regional Board should not seek enforcement of the waste discharge requirements against the Forest Service unless Calgom fails to comply.

IV. ORDER

IT IS HEREBY ORDERED THAT the petition is denied.

CERTIFICATION

The undersigned, Administrative Assistant to the Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on April 16, 1987.

AYE: W.D. Maughan
 D.E. Ruiz
 E.H. Finster
 D. Walsh
 E.M. Samaniego

NO: None

ABSENT: None

ABSTAIN: None


Maureen Marche
Administrative Assistant to the Board